Supreme Court, U.S.
FILED
FEB 4 - 2005
OFFICE OF THE CLERK

No. 04-614

In The Supreme Court of the United States

KAREN ANN F. KELLY,

Petitioner,

vs.

COUNTY OF ORANGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR REHEARING

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly held, in conflict with decisions from the First, Tenth, and Eleventh Circuits, as well as within its own Circuit, that a Title VII plaintiff claiming religious discrimination by means *inter alia* of threats and retaliation must prove that the employer's decision to transfer her was "sufficiently adverse" in tangible economic terms to make a *prima facie* case, absent which her evidence as to non-economic factors such as retaliatory animus, severe harassment and threats of discharge on account of her religious practice, observance and belief were disregarded.

2. Whether the decision below, affirming the grant of a directed verdict (judgment as a matter of law) against petitioner, pursuant to Federal Rule of Civil Procedure 50(a), conflicted in principle with this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), and usurped the role of the jury, in that the Courts below did not review all the evidence plaintiff adduced, did not draw all reasonable inferences in her favor, and failed to disregard all evidence favorable to the moving party that jurors would not have been required to believe.

PETITION FOR REHEARING

I. This Court Should Grant A Rehearing To Resolve The Persistent And Deepening Conflict Among And Even Within The Circuits Over Whether Title VII Claimants Must Prove They Suffered "Sufficiently Adverse" Tangible Economic Harm In Order To Make A *Prima Facie* Case.

On January 10, 2005, this Court entered an Order denying the petition for writ of certiorari in this case. Thus petitioner now timely urges that the Court grant a rehearing in this matter, in order to resolve an inter-Circuit conflict that has continued, and deepened, even since the filing of the petition in this case. That conflict, furthermore, has caused a great deal of disarray in the relevant jurisprudence under Title VII of the Civil Rights Act of 1964, as amended. No doubt it will persist and may become entrenched, if it is not already, unless and until this Court steps in to resolve the conflict and bring order to this vast corpus of case law.

Here, the Ninth Circuit panel below had held that when petitioner was transferred to the evening shift at a different facility, to perform a job for which she was not trained or qualified, and for which she did not receive a proper orientation, "[e]ven if [she] created genuine disputes as to these facts and the disputes were resolved in her favor, the transfer *would not constitute a sufficiently adverse change in the terms, conditions, and privileges of [petitioner's] employment* to make the accommodation unreasonable under Title VII" (Petition for Certiorari, Appendix, 3a; emphasis supplied). What the Court below held dispositive, again, were tangible economic factors: "It is undisputed that [petitioner] accepted the transfer, that

her job title remained the same, that she received an increase in pay rate, that she requested and received a decrease in hours, and that her new job was appropriate for a nurse with some degree of experience and training" (*Id.*, p. 2a).

True, cases in the Fifth and Eighth Circuits, handed down since the filing of the petition in this case suggest that, as the court put it in *Brazoria County v. EEOC,* 391 F.3d 685 (5th Cir. 11/9/04), the adverse employment action sufficient to support a Title VII claim must be an ultimate employment decision: "For the claimed ostracism, the retaliatory activities did nothing more than affect conditions in the workplace. None of the events [charged as retaliatory] are akin to the 'hiring, granting leave, discharging, promoting, and compensating' examples listed in *Mattern [v. Eastman Kodak,* 104 F.3d 702, 707, cert. den., 522 U.S. 932]." *Brazoria Cty.,* 391 F.3d at 693. *See also, Okruhlik v. University of Arkansas,* 2005 U.S. LEXIS 1140 (Jan. 24, 2005), reaffirming the Eighth Circuit's position, as stated in *Duncan v. Delta Consolidated Indus.,* 371 F.3d 1020, 1026 (8th Cir. 2004), quoting *Spears v. Mo. Dep't of Corres. & Human Res.,* 210 F.3d 850, 853 (8th Cir. 2000): "A plaintiff suffers an adverse employment action when the action results in a 'material employment disadvantage' such as 'termination, reduction in pay or benefits, and changes in employment that significantly affect an employee's future career prospects.'"

On the other hand, in addition to the cases from the First, Tenth and Eleventh Circuits cited in the Petition, which take a far more liberal view of what constitutes the necessary "adverse action" to support a Title VII claim (Pet., pp. 14-15), even within the Ninth Circuit itself there is substantial jurisprudence to the contrary of what the panel held below. In *Ray v. Henderson,* 217 F.3d 1234,

1241 (9th Cir. 2000), the court observed, "The circuits are currently split as to what constitutes an adverse employment action. Although we have yet to articulate a rule defining the contours of an adverse employment action, our prior cases situated us with those circuits that define adverse employment action broadly. Other circuits that define adverse employment action broadly are the First, Seventh, Tenth, Eleventh and D.C. Circuits. An intermediate position is held by the Second and Third Circuits. The most restrictive view of adverse employment actions is held by the Fifth and Eighth Circuits." The court went on to expound on the details of the contradictory holdings on this critical essential issue in all Title VII and other employment discrimination litigation. *Id.*

Without more, we must urge this Court to consult a number of recent comprehensive law review articles that canvass the details of this conflict in the jurisprudence, which clearly support the grant of rehearing herein and the plenary review of this case, as a proper vehicle for resolution of this pressing issue in employment discrimination law. *See generally, e.g.,* R. Levinson, "Parsing the Meaning of 'Adverse Employment Action' in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should Be Actionable Wrongdoing," 56 Okla. L. Rev. 623 (Fall, 2003); J. Kravetz, "Deterrence v. Material Harm: Finding the Appropriate Standard to Define an 'Adverse Action' in Retaliation Claims Brought Under the Applicable Equal Employment Opportunity Statutes," 4 U. Pa. J. Lab. & Emp. L. 315 (Winter, 2002); E. Lidge, "The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove That the Employer's Action Was Materially Adverse or Ultimate," 47 Kan. L. Rev. 333 (January, 1999).

CONCLUSION

Clearly, this conflict on such a key issue in all of employment discrimination law must ultimately be resolved, or there will be a different civil rights law prevailing in different parts of the United States. This case, in which so much contradictory testimony was brushed aside in the trial court's preemptive ruling against the petitioner and in the Ninth Circuit's cursory review of the record, offers a prime opportunity for this Court to strike order from what increasingly appears to be a chaotic area of federal law – an area, moreover, which represents a very substantial portion of the business of our federal courts.

Respectfully, therefore, Petitioner urges that this Court grant her a rehearing, and that it grant the petition for writ of certiorari herein.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Thomas Brejcha hereby certifies that he is counsel of record herein for the Petitioner, Karen Ann Kelly; that pursuant to Rule 44(1) of this Court, he also certifies that this petition for rehearing is filed in good faith and not for delay; and that pursuant to Rule 44(2) of this Court, he further certifies that the grounds urged for rehearing herein have been limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

_____

Counsel for Petitioner

APPENDICES

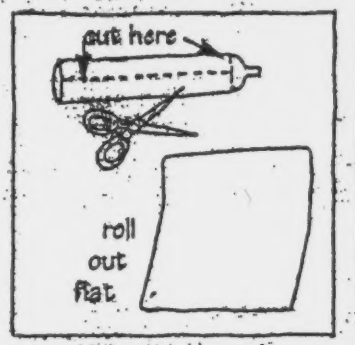
Appendix 1 – Diagram "Using Latex Barriers".....App. 1

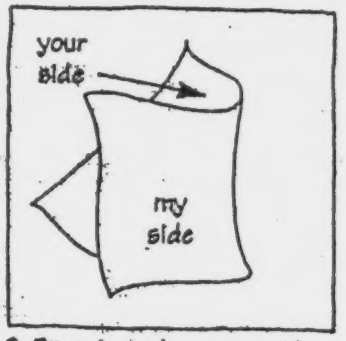
Appendix 2 – "Using Condoms" .....App. 2

(Both pages excerpted from ER III, HIV Training Materials, to the use of which Petitioner objected)

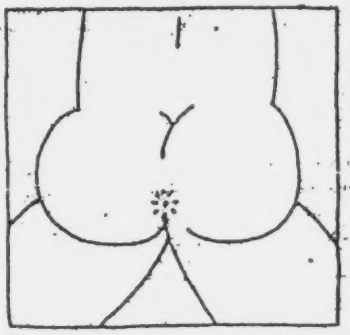
USING LATEX BARRIERS

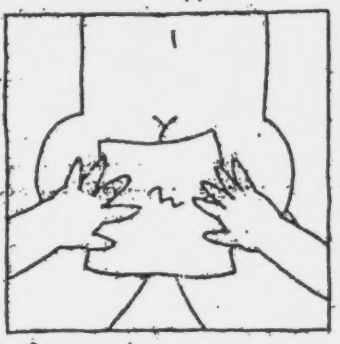
1. Latex dams are flat squares of latex rubber. They can be placed against a woman's vagina during mouth-to-vagina sex, or against a woman's or man's anus during mouth-to-anus sex. The dam keeps fluids from being shared between sex partners. It is believed latex dams can prevent HIV and other sexually transmitted diseases. To make a dam, cut down a non-lubricated condom so it lies flat. Or buy dental dams from dental supply houses or stores that sell sexual supplies.



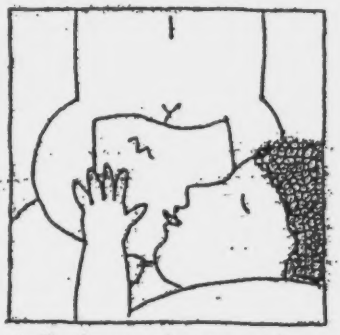


2. Be sure to keep one side towards you and the other side towards your partner.





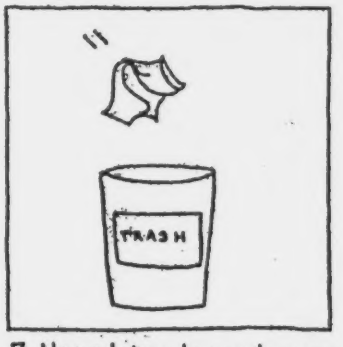
3. Place the dam over the anus for mouth-to-anus sex.



4. Don't use the same dam for anal, and then vaginal, sex.

5. Place the dam over the vaginal lips for mouth-to-vagina sex.

6. Don't use the same dam for anal, and then vaginal, sex.

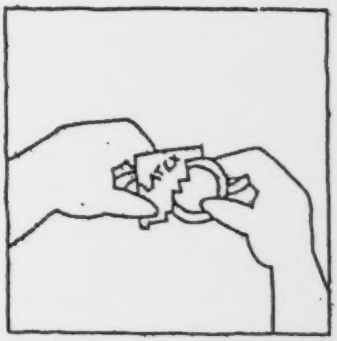


7. Use a latex dam only once and then throw away. Throw into trash, not down toilet.

From Quackenbush M, Benson JD, Ehrald J. *Risk and Recovery: AIDS, HIV and Alcohol.* San Francisco: UCSF AIDS Health Project, 1982. May be reproduced for educational purposes.

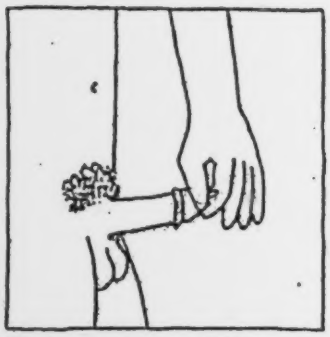
BEST AVAILABLE COPY

USING CONDOMS

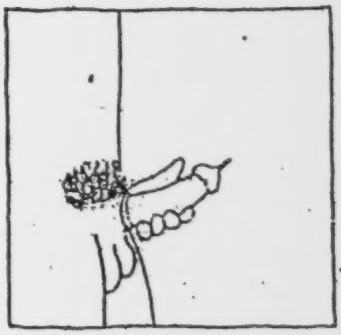


1. Use latex condoms. Open package carefully.

2. Put condom on erect (hard) penis.



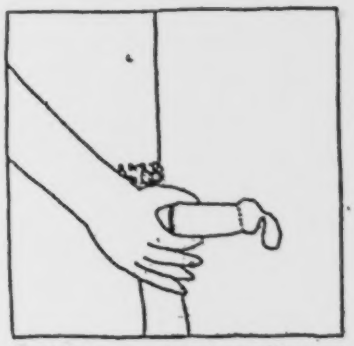
3. Press air out of tip of condom.



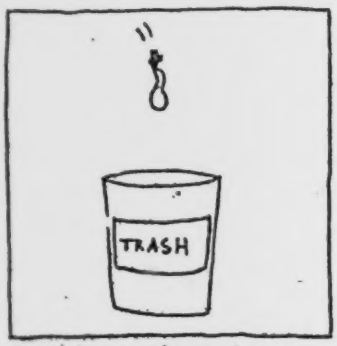
4. Unroll condom and cover whole penis.

5. Always use water-based lubricant to help keep condom from breaking. Never use oil-based lubricants.

6. Hold condom at base during insertion.



7. After sex, hold condom at base and pull out gently before penis gets soft.



8. Use a condom only once and then throw away. Throw into trash, not down toilet.

From Quackenbush M, Benson JD, Rinaldi J. *Risk and Recovery: AIDS, HIV and Alcohol.* San Francisco: UCSF AIDS Health Project, 1992. May be reproduced for educational purposes.